Barnard College *and* Transport Workers Union of America, Local 264, AFL–CIO. Cases 2–CA–33460 and 2–CA–33462

October 21, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 14, 2002, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

The judge found that the Respondent violated Section 8(a)(1) on August 24, 2000,[4] by limiting the role of an employee's *Weingarten* representative to that of a silent observer. He also found that the Respondent violated Section 8(a)(5) and (1) on November 30, by unilaterally changing the parties' agreed-upon grievance handling procedures when the Respondent's director of facilities services, Suzanne Gold, refused to meet with two union representatives at a second-step grievance meeting. The judge found, however, that the Respondent did not unlawfully suspend employees John Crespo and Fernando Calvo on August 24, after its managers were unsuccessful in interviewing the employees as part of its investigation of a student's complaint, or by discharging Crespo on November 28, based partly on his August 24 suspension. Although our analysis of the suspensions differs somewhat from that of the judge, we affirm his conclusions as to each alleged violation, as explained below.[5]

FACTS

On Sunday, August 20, while cleaning dormitory rooms in preparation for the arrival of new residents, two of the Respondent's housekeeping employees, Fernando Calvo and John Crespo, entered, through a side door, a room they believed was unoccupied and in need of cleaning. While they were cleaning the room, however, a student entered and informed Crespo that she was moving into the room and that some of the items the employees had removed as trash were her property. The trash bags containing items that they had removed were returned, and the student identified her belongings. She later informed Crespo, however, that approximately $100 was missing from her wallet. Calvo contacted the Respondent's security personnel, who interviewed the student and the two employees.

On Monday, August 21, several of the Respondent's managers interviewed Calvo and Crespo separately regarding the prior day's incident. Each employee was actively assisted during his interview by three union representatives: two housekeeping employees and Security Officer Roberto Martin. Martin, a Spanish speaker, was able to translate the Respondent's questions for Calvo and Crespo. The housekeeping representatives also participated in the discussion; they explained that housekeeping employees commonly cleaned rooms that were not on their work lists because the lists were often inaccurate as to which rooms were vacant.

On August 24, the Respondent scheduled another round of interviews, first with Crespo and then with Calvo. At the start of Crespo's interview, the Respondent's director of safety and security, William Plackenmeyer, told Martin, the only union representative present, that he must not say anything or interrupt Plackenmeyer's questioning, and that he was there only to observe the process. Martin, disagreeing with this instruction, summoned Union President Orton Reynolds, also a security officer, to the meeting. After Plackenmeyer reiterated the restrictions, Reynolds insisted that both he and Martin be permitted to attend the meetings, with Martin present to represent the employees and Reynolds to protect the Union's interests. Reynolds testified that,

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has requested that the notice be posted in both English and Spanish. Based on the discriminatees' limited English proficiency and the absence of any opposition to this request by the Respondent, we find it appropriate to grant the General Counsel's request, and we modify the Order accordingly.

We also correct the notice to require the Respondent to provide the Union with notice and an opportunity to bargain before making any changes in the grievance procedure, consistent with par. 2(a) of the Order.

[3] All dates are in 2000 unless otherwise indicated.

[5] We affirm the judge's finding of the Sec. 8(a)(5) unilateral change violation without further discussion.

in light of the Respondent's demand that Martin do nothing but observe, Reynolds needed to remain in the room as a witness, in case the Respondent claimed that Martin had violated its instructions by speaking up during the interview.

Extensive discussions ensued in response to Reynolds' insistence that both he and Martin be present for the interviews with Crespo and Calvo, including telephone conversations with the Respondent's general counsel, Michael Feierman. The Respondent, concerned about having two on-duty security guards in the meeting rather than at their assigned posts, made various alternative proposals, none of which the parties were able to agree to.[6] When the parties were unable to reach compromise, both Reynolds and Martin left the room on Plackenmeyer's orders. They advised each employee, however, to state his willingness to cooperate with the investigation, as long as union representation was provided.

When the Respondent attempted to restart the interviews with the two employees, each insisted on union representation, as Reynolds and Martin had instructed. Crespo, by his own admission, demanded representation by both Martin and Reynolds. Exactly what Calvo demanded is unclear because of the witnesses' conflicting testimony, but he certainly did not select one representative, even when the Respondent instructed him to do so. Plackenmeyer told each employee that if he failed to cooperate, he would be suspended. When Crespo and Calvo each continued to assert his unwillingness to answer questions in the absence of his union representatives, each employee's interview was cancelled and each employee was immediately informed that he was suspended. The following day, each received a letter stating the length of his suspension and giving four reasons for it, one of which was the "failure to cooperate in the College's investigation."[7] Each employee served out his suspension—5 days for Calvo, 10 days for Crespo—and returned to work.

ANALYSIS

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court approved the Board's conclusion that Section 8(a)(1) of the Act provides employees the right to be accompanied and assisted by their union representative at meetings that the employee reasonably believes may result in disciplinary action. The employee has the right to advice and active assistance from the union representative. Id. at 260, 263. The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the meeting. *Anheuser-Busch, Inc.*, 337 NLRB No. 2 (2001), enfd. 338 F.3d 267 (4th Cir. 2003); *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981). Nonetheless, the union representative may not turn the meeting into an adversarial proceeding,[8] may not prevent the employer from questioning the employee, even repetitiously,[9] and "may not interfere with legitimate employer prerogatives."[10]

Here, we find that the Respondent violated Section 8(a)(1) by unlawfully limiting the union representative's participation in Crespo's investigatory interview. As the judge found, Plackenmeyer restricted Martin's role to that of an observer and prohibited Martin from speaking. Such a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to *assist* the employee being interviewed. *Weingarten*, 420 U.S. at 260; *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470 (5th Cir. 1982). The union representative cannot be made to sit silently like a mere observer. *Talsol Corp.*, 317 NLRB 290, 331–332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998).[11] After initially imposing the limitation on Martin and then repeating it to Reynolds, the Respondent never changed its position. Although the Union ultimately demanded that two representatives be present at the interview, a demand that *Weingarten* does not require the Respondent to meet, this does not excuse the Respondent's prior unlawful limitation. We thus find that the Respondent violated Section 8(a)(1) by denying Crespo's right under *Weingarten* to have the assistance of a union representative at the August 24 investigatory interview.

Nevertheless, we find that the Respondent did not violate Section 8(a)(1) by suspending Crespo and Calvo at the end of each employee's August 24 interview. The complaint alleges that Crespo and Calvo were unlawfully suspended because they refused to participate in the in-

[6] Reynolds agreed with the Respondent's offer to replace Martin with the only other Spanish-speaking union representative, housekeeping employee David Pedrosa, but Pedrosa was not at the facility at the time. Reynolds refused the Respondent's offer to have Martin, plus a union representative from the housekeeping department, but not Reynolds, represent the employees.

[7] The suspension letters to the employees indicate that the decision was based on (1) their unauthorized presence in a student's room, (2) their removal of the student's belongings, and (3) their failure to provide a consistent and satisfactory explanation of the incident, as well as (4) their refusal to cooperate in the investigation.

[8] *Weingarten*, 420 U.S. at 263; *Yellow Freight System*, 317 NLRB 115, 123–124 (1995).

[9] *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 (1992).

[10] *Weingarten*, 420 U.S. at 258; *Roadway Express, Inc.*, 246 NLRB 1127, 1128 (1979).

[11] See also *Postal Service*, 288 NLRB 864, 868 (1988); *Greyhound Lines*, 273 NLRB 1443, 1448 (1985); *Southwestern Bell Co.*, 251 NLRB at 613; *Texaco, Inc.*, 251 NLRB 633, 636–637 (1980), enfd. 659 F.2d 124 (9th Cir. 1981).

vestigatory interviews without union representation, because they requested union representation in the interview, and to discourage employees from engaging in these activities. Thus, the complaint alleges that the suspensions were motivated by the employees' protected concerted activity, i.e., insisting on their *Weingarten* right to union representation.

We analyze such motive-based allegations under the framework established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *T.N.T. Red Star Express*, 299 NLRB 894, 895 fn. 6 (1990) (applying *Wright Line* analysis in case of discipline imposed because of assertion of *Weingarten* rights).[12] Applying the *Wright Line* analysis, we conclude that Crespo and Calvo's suspensions did not violate the Act. Under *Wright Line*, discipline that is alleged to have been motivated by employees' protected conduct is subject to a two-step test. First, the General Counsel must establish that the employee has engaged in protected concerted activity and that animus against that conduct was a motivating factor in the imposition of discipline. If that showing is made, the Board will find the violation unless the employer proves that it would have disciplined the employee even in the absence of protected conduct. Here we find that the General Counsel failed to meet his initial burden.[13]

While *Weingarten* established that an employee's demand for a union representative at an investigatory interview constitutes protected concerted activity, *Weingarten*, 420 U.S. at 260–261, we find that Crespo and Calvo's demands for not one, but two, union representatives[14] were not protected conduct. Our colleague argues that the request for two representatives was inextricably intertwined with the Respondent's antecedent unlawful conduct, i.e. the insistence that the representative be silent. However, the fact that one party has violated the Act in a particular way does not give the other party carte blanche to engage in any conduct that he chooses. More particularly, the Respondent's refusal to do that which the law requires (allow one representative to speak) does not give the other party the right to insist upon that which the law does not require (insist upon two representatives). Neither *Weingarten* nor its progeny provide the right to two representatives, particularly where, as here, both proposed representatives were on-duty security guards, the Respondent informed the Union that it needed to have one of them continue their security duties, and the Respondent offered a reasonable compromise that the Union rejected.

Our colleague also states that Crespo's and Calvo's "*assertion* of *Weingarten* rights was a motivating factor in their suspensions." (Emphasis added). However, it was their *insistence* upon two representatives that was the motivating factor. As discussed above, that insistence was unprotected. Thus, the suspensions were lawful.[15]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Barnard College, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in New York, New York copies, in English and Spanish, of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places

[12] The judge, citing *Taracorp, Inc.*, 273 NLRB 221 (1984), and several other cases, stated that "[t]he Board will not order a make-whole remedy for a *Weingarten* violation unless the General Counsel can show that the discipline was the direct result of the employee's assertion of his *Weingarten* rights." *Taracorp*, supra; *Greyhound Lines*, supra; *Massillon Community Hospital*, 282 NLRB 675 (1987). To clarify, the Board does not order make-whole remedies for the *denial* of employees' *Weingarten* rights. *Taracorp, Inc.*, 273 NLRB at 223. The appropriate remedy for a *Weingarten* violation is an order requiring the employer to cease and desist from further such violations and to post a notice to that effect. Id. at 224.

A make-whole remedy is appropriate only if the General Counsel can prove an *additional* violation, i.e., that Calvo and Crespo were disciplined, at least in part, for *asserting* their *Weingarten* rights. That formulation is consistent with the *Wright Line* analysis that we apply here. As the Board in *Taracorp* stated, "[a] make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for *asserting* the right to representation." 273 NLRB at 223 fn. 12 (emphasis added). For the reasons discussed in text below, we find that the General Counsel has failed to make that showing.

[13] Because we find that the General Counsel failed to meet this *Wright Line* burden we find it unnecessary to address the dissent's arguments that the Respondent did not meet its rebuttal burden.

[14] As described above, Crespo expressly demanded that both Martin and Reynolds be permitted to represent him, and Calvo refused to select one representative despite being instructed to do so.

[15] The General Counsel also alleges that the discharge of Crespo was unlawful. However, the sole basis for the allegation is that the suspension, on which the discharge was based, was unlawful. As shown, the suspension was lawful.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employee are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, English and Spanish copies of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2000."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 21, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The Respondent violated the Act by insisting that John Crespo and Fernando Calvo were entitled to only a silent union observer at their disciplinary interviews, instead of the aid of a genuine representative, as envisioned by *Weingarten*[1] and its progeny. My colleagues correctly recognize as much.[2] In their view, however, Crespo and Calvo went too far in demanding *two* union representatives; thus the Respondent was free to suspend both employees, and then to discharge Crespo, on that ground. But, their view ignores the direct connection between the Respondent's unlawful denial of representation and the employees' subsequent demand. Nor does the record establish that the Respondent would have suspended Crespo and Calvo apart from their demand for representation. If Crespo's suspension was unlawful, then his discharge—which was predicated in part on the suspension—must be evaluated separately under *Wright Line*,[3] a matter for remand.

1. Unlike my colleagues, I find that Crespo's and Calvo's demands for union representation were protected conduct, even if the employees actually insisted on being represented by both Reynolds and Martin—an issue on which the record is far more ambiguous (especially as to Calvo) than the majority acknowledges.[4] It is clear that Reynolds insisted that both he and Martin be present solely because of and in direct response to Plackenmeyer's unlawful limitation of the representative to the role of silent observer. The Union's demand is thus inextricably intertwined with the Respondent's unlawful conduct.[5] The Union's insistence on two representatives—one of whom was needed simply to overcome the language barrier between the employees and the Respondent's managers—was a reasonable response to the Respondent's unlawful conduct and cannot justify penalizing the employees.

2. That Crespo's and Calvo's assertion of *Weingarten* rights was a motivating factor in their suspensions is established by the Respondent's own testimonial and documentary evidence. Thus, the only remaining question is whether the Respondent has shown that it would have suspended the employees in the absence of this conduct.

3. In my view, the Respondent has not met its burden. The Respondent's managers, particularly Gold and Plackenmeyer, made it quite clear to the employees before suspending them that if they did not cooperate in the interview (i.e., if they continued to insist on union repre-

[1] *NLRB v. Weingarten*, 420 U.S. 251 (1975).

[2] I agree with the majority that the Respondent also violated the Act by refusing to meet with union representatives Reynolds and Martin at a second-step grievance meeting.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] The evidence that Crespo demanded representation by both Reynolds and Martin contradicts other testimony by him that he merely demanded "representation, somebody representing me," and the judge did not make findings regarding exactly what he said. As to Calvo, there is no record evidence that he demanded representation by both Reynolds and Martin. Although Gold testified that Calvo demanded "representatives," both Calvo and Plackenmeyer testified that Calvo asked for "my Union representative." The judge found that the Respondent's witnesses' testimony regarding the various conversations of Aug. 24 was less detailed than that of the employees and union representatives, and that Gold did not recall everything that was said. My colleagues appear to rely on Calvo's failure to specify a single representative he preferred when the Respondent's managers demanded that he do so. Nevertheless, the employees' demands occurred after both union representatives had been evicted from the room, and the dialogue appearing in the record strongly suggests that, in the absence of a translator, Calvo did not understand that the Respondent was ordering him to choose one individual or the other as his representative. I thus disagree with the majority's determination that Calvo and Crespo in fact demanded representation by both Reynolds and Martin.

[5] The majority states that the Union's insistence that two representatives attend the investigatory interview was the wrong response to Plackenmeyer's demand that the union representative remain silent. Reynolds testified, however, that, upon his arrival, he informed Plackenmeyer that this restriction on the union representative's role was unlawful and they argued the issue at some length. Plackenmeyer did not contradict this testimony. Moreover, the judge found no evidence that Plackenmeyer ever retreated from his initial position regarding the union representative's role. Thus, the Union did attempt, without success, to insist that the employees' representative be allowed to speak. Only when this effort had failed did Reynolds demand that both union representatives be present at the interview.

sentation), they would be suspended. And when they continued to insist on union representation, they were immediately suspended. Only in its later documentation of the suspensions did the Respondent indicate that the suspensions had any basis other than the assertion of *Weingarten* rights. Moreover, the Respondent has provided no evidence that it would have taken the same action in the absence of such conduct by the employees: no evidence of similar discipline in comparable situations;[6] no evidence that the progressive discipline policy mandates such discipline;[7] and certainly no evidence that it had decided to impose the suspensions before the employees engaged in protected conduct.

4. Finally, as for Crespo's discharge, it was based, in part, on his entire disciplinary history, including the August suspension, which I believe was unlawful. As with the suspensions, then, the lawfulness of the discharge must be analyzed under the *Wright Line* framework. The judge did not apply this approach; indeed, he summarily dismissed the unlawful discharge allegation, as my colleagues do, on the basis of their conclusion that the suspensions were lawful. In view of the judge's summary treatment of the discharge allegation, I would sever this issue and remand it to the judge for initial findings and conclusions.

Dated, Washington, D.C. October 21, 2003

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny you your right to a union representative at an investigatory interview that you reasonably believe may result in discipline.

WE WILL NOT refuse to meet with your designated union representatives at grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL provide the Union with notice and an opportunity to bargain before making any changes in the grievance procedure covering the employees in the bargaining unit.

BARNARD COLLEGE

Gregory B. Davis, Esq., for the General Counsel.
Daniel F. Murphy, Jr., Esq., and Alex Tchernovitz, Esq., (Putney, Twombly, Hall & Hirson LLP), for the Respondent.
Orton Reynolds, President, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York, on April 16 and 17, 2002. Transport Workers Union of America, Local 264, AFL–CIO (the Union) filed the charges in Case Nos. 2–CA–33460 and 2–CA–33462 on December 7, 2000 and December 8, 2000, respectively.[1] The consolidated complaint issued May 21, 2001, alleging that the Respondent, Barnard College, violated Section 8(a)(1) of the Act, on or about August 24, by denying employees John Crespo and Fernando Calvo their right to union representation at an investigatory interview which they had reasonable cause to believe would result in discipline, by conducting investigatory interviews of Crespo and Calvo without the benefit of union representation and by suspending them for refusing to participate in these interviews. The complaint alleges further that the subsequent discharge of Crespo on November 28, violated Section 8(a)(1) because based, in part, on the allegedly unlawful suspension under the Respondent's progressive disciplinary procedure.[2] Finally, the complaint alleges that the Re-

[6] Theft of the student's money was not among the reasons given for the suspensions, either in the suspension letters or in the testimony of the Respondent's witnesses.

[7] The progressive discipline procedures contained in the parties' collective-bargaining agreement state a "pattern" of progression that will "usually" be followed, but expressly states that "steps are not followed by rote. The level of disciplinary action taken will depend on the severity of the conduct as determined by the College." Because this statement of procedures reserves for the Respondent such broad discretion, it fails to demonstrate that the Respondent would have suspended Calvo and Crespo in the absence of their protected conduct.

[1] All dates are 2000 unless otherwise indicated.

[2] The Respondent's actions on August 24 and November 28 were also alleged, at paragraph 11 of the complaint, as violative of Sec. 8(a)(1) and (3) of the Act. The General Counsel moved to withdraw that allegation in his brief. I hereby grant General Counsel's request to amend the complaint to withdraw par. 11.

spondent violated Section 8(a)(1) and (5) of the Act, since November 30, by failing and refusing to meet with union representatives Orton Reynolds and Roberto Martin regarding grievances if both Reynolds and Martin attended the meeting.

The Respondent filed an answer to the complaint on June 5, 2001, denying the unfair labor practice allegations and asserting several affirmative defenses. Specifically, the Respondent asserted that all its actions relating to the complaint allegations were taken for legitimate, nondiscriminatory reasons; that the complaint should be deferred to the parties' contractual grievance/arbitration procedures pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984); and that the complaint is barred by the doctrine of "unclean hands" because the Union failed to participate in the agreed-upon grievance and arbitration procedures.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a private college at its facility in New York, New York, where it annually derives gross revenues, exclusive of contributions that are not available for operating expenses, in excess of $1 million, and purchases and receives products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent, while denying knowledge or information sufficient to form a belief as to the labor organization status of the Union, admits having recognized and bargained with the Union as the Section 9(a) representative of certain of its employees. Based on this admission and the other evidence in the record, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Weingarten Violations

The Union has represented a unit of the Respondent's full-time, regular part-time, and temporary buildings and grounds and residence halls employees for a number of years. The collective-bargaining agreement in effect at the time of the alleged unfair labor practices was effective from October 1, 1999 through September 30, 2002, and contained a grievance procedure ending in arbitration. The Union also represents a separate unit of employees in the Respondent's Safety and Security Division.

Fernando Calvo has been employed by the Respondent as a housekeeper since February 28, 1997. In August 2000, he worked full-time, 4 p.m.—Midnight, Monday through Friday and overtime on weekends as needed. There is no evidence that he had received any discipline before the August 2000 incident at issue here. John Crespo was hired by the Respondent in April 1999 as a part-time housekeeper, working Saturdays and Sundays. By the end of 1999, he had become a full-time employee, working the same shift as Calvo. Unlike Calvo, Crespo had already received discipline in his relatively short tenure with the Respondent, having been suspended for 3 days in March for alleged insubordination toward his supervisor, and verbally warned on August 14, for tardiness. Calvo and Crespo were supervised by Assistant Night Manager Carol Wynne. Although Calvo and Crespo speak primarily Spanish, they speak and understand some English with Crespo more proficient in English than Calvo. They acknowledged receiving their work instructions in English. Both testified at the hearing with the assistance of a translator.

Calvo and Crespo were assigned to work together the weekend of August 19 and 20, cleaning rooms on the fourth floor of Hewitt Hall, a student dormitory. Attached to Calvo's timecard when he arrived for work that Saturday morning was a "Service Request" form with a list of specific rooms to clean on Saturday and Sunday. This list was prepared by one of the Respondent's housekeeping managers based on information from the office of Residential Life indicating which rooms would be vacant and in need of cleaning before new students arrived. Suzanne Gold, the Respondent's Director of Facilities Services at the time, conceded that the information from Residential Life is not always accurate because students sometimes move in early or leave after their scheduled departure date. It is undisputed that the weekend in question was a busy time with students in transition between the end of the summer term and the start of the fall semester.

Calvo and Crespo testified that they followed a routine to clean the rooms on the fourth floor with Calvo entering the room first to empty the garbage, take out the sheets, clean the windows, etc. with Crespo following him to sweep, mop, and wax the floors. Calvo admitted that he did not follow the list attached to the timecard. According to Calvo, some of the rooms on the list were still occupied and other rooms, not on the list, were vacant. Crespo testified that he did not know whether they followed the list because he simply followed Calvo. Calvo and Crespo worked without incident on Saturday and through most of Sunday. Crespo testified that on Sunday afternoon, toward the end of the shift, as he checked to make sure that all the rooms were cleaned, he came across a room that was in disarray. Calvo admitted entering this room through a connecting bathroom from another room rather than from the door opening onto the hallway. According to Calvo, he began to clean the room, taking out garbage bags. While he was doing this, Crespo told Calvo that a student told him that she was in the process of moving into that room and the "garbage" Calvo had removed was her stuff. Calvo then retrieved the garbage bags and brought them back to the room. A short time later, the student complained to Crespo that some money was missing from her room. When Crespo reported this to Calvo, Calvo notified security and a security guard came to the floor.

The security guard spoke to the student and then spoke to Calvo and Crespo. A security supervisor was also summoned and he questioned Calvo and Crespo, separately, about the incident as well. The next day, Monday, August 21, Calvo and Crespo were called to a conference room in the facilities service department office and questioned, separately, about the incident by Gold. Their supervisor, Wynne, and Henry

Timmermann the manager of housekeeping services were also present. There is no dispute that three union representatives, Unit representative Roberto Martin, Vice President Peggy Kaiser, and Recording Secretary Wilhelmina Adams, also attended this meeting. Kaiser and Adams are also housekeepers. Martin is a security officer and bilingual. He assisted Calvo and Crespo as their translator during this meeting.

There is no dispute that Calvo and Crespo answered all of Gold's questions. Gold disputed Martin's testimony that he served as a translator for the employees. According to Gold, she asked and the employees answered in English with Martin being called upon to translate only once when Calvo had difficulty understanding the word "luggage". Gold also contradicted Martin's claim that he spoke up several times in defense of the employees. Gold claimed that Martin was silent throughout this meeting.[3] Gold did corroborate the General Counsel's witnesses that Adams and Kaiser spoke up to defend the procedures used by Calvo and Crespo to clean the rooms on the fourth floor. At the end of the August 21 interviews, Gold advised Calvo and Crespo that the incident was still under investigation and that she would get back to them. Calvo, Crespo, and Martin conceded that at no time during this interview did Gold interfere with the employees' right to union representation. Significantly, the General Counsel does not allege that the Respondent violated the Act during the August 21 investigatory meeting.

On Thursday, August 24, Calvo and Crespo were again summoned to the conference room, this time to be questioned by William Plackenmeyer, the Respondent's director of safety and security and a former New York City policeman. There is no dispute that Crespo was called in first and that Martin was again present to represent him. Gold and Timmermann were also present. According to Martin, Plackenmeyer opened the meeting by looking at him and saying, "these are the rules. You're only here to observe. Don't interrupt and don't get involved in the investigation." On cross-examination, Martin acknowledged that, in his affidavit, he had recalled that Plackenmeyer also told him that he was not to answer Plackenmeyer's questions for the employees. Martin testified further that, after Plackenmeyer finished his "instructions", he told Plackenmeyer that he disagreed with him and that he was going to get the union president. Martin then left the room to call Reynolds. According to Martin, Plackenmeyer did not ask Crespo any questions about the August 20 incident before Martin left the conference room. When Crespo testified about this second meeting, he appeared to confuse it with the first, recalling that Martin, Kaiser, and Adams were already there when he arrived at the conference room. Crespo also testified that Plackenmeyer asked him the same questions Gold had asked him about the student's complaint, but that the questioning stopped after Plackenmeyer and Martin had a conversation and Martin left to get Reynolds. During cross-examination, Crespo ultimately acknowledged that he did not have a clear recollection what happened on August 24.

Gold and Plackenmeyer testified that Plackenmeyer opened the meeting by explaining the purpose of the investigation and by telling Crespo that he would be asking Crespo some questions and he expected Crespo to answer them and that he did not expect to be interrupted. According to Gold and Plackenmeyer, Martin became "upset" at that point, even though Plackenmeyer had not addressed Martin directly, and said he was going to get Reynolds. Gold and Plackenmeyer denied that Plackenmeyer said that Martin was only there as an observer, or that Martin would not be permitted to speak during the interview. Timmermann did not fully corroborate Gold and Plackenmeyer. When first questioned about the meeting, Timmermann recalled that Plackenmeyer told Martin, "you're just here to sit and observe." On further questioning, Timmermann elaborated, testifying that Plackenmeyer said that Martin could "observe—listen to the questions, observe the process. If you want to talk to the employee outside, but you have to let met finish the questions first." Only in response to a leading question from Respondent's counsel, did Timmermann deny that Plackenmeyer told Martin that he had to be quiet during the meeting. Timmermann did recall Plackenmeyer telling Martin not to interrupt Plackenmeyer's questioning.

Martin and Reynolds testified that, when Reynolds arrived at the conference room, he asked Plackenmeyer what was going on. When Plackenmeyer repeated his instructions, as described by Martin, Reynolds told him that was not how it worked and asked to speak to Plackenmeyer. Reynolds then had a conversation with Plackenmeyer in Plackenmeyer's office with no one else present. According to Reynolds, he told Plackenmeyer that he could not limit the role of the union representative in this type of investigation to that of an observer. Plackenmeyer insisted that he had a right to conduct the investigation without interruption. Reynolds and Plackenmeyer argued this point for several minutes. At some point during the conversation, Reynolds told Plackenmeyer that, if he was going to insist that Martin just sit there and not interrupt, then Reynolds would have to attend the interview to make sure there was no claim that Martin somehow exceeded the boundaries being imposed by Plackenmeyer. As Reynolds explained to Plackenmeyer, Martin would be at the meeting to protect the employee being questioned and Reynolds would be there to protect the Union's interest. According to Reynolds, Plackenmeyer told him he would not allow both Reynolds and Martin to attend the meeting.

There is no dispute that, at another point in this dispute, a telephone call was placed to the Respondent's General Counsel, Michael Feierman. Plackenmeyer spoke to Feierman first and then Reynolds got on the phone. According to Reynolds, Feierman disagreed with his position, telling Reynolds that the Union did not have a right to have two representatives at the investigatory interview. It is not clear whether Feierman was aware that Plackenmeyer told Martin and Reynolds that the union representative could only observe during the interview. Feierman testified that he was never told this. Because Plackenmeyer and Gold deny that this was the instruction given to

[3] Crespo testified that he spoke English during his interview and that Martin did not arrive until the end of the meeting. Calvo testified that Martin translated Gold's questions for him and he answered in Spanish with Martin translating his answers. Calvo also testified that Gold tried to intimidate him but that she stopped after the union representatives spoke to her in English.

Martin, they did not testify to providing this information to Feierman. Reynolds only spoke to Feierman after Plackenmeyer and could not testify to the contents of Plackenmeyer's conversation with Feierman. In any event, the situation was not resolved after this communication and the discussion continued in the hallway and the conference room.

Reynolds testified that, at a later point in the discussion, Plackenmeyer told him that he did not want Martin and Reynolds at the meeting because they were both security officers who were on duty. There is no dispute that Plackenmeyer offered a compromise. Crespo and Calvo could have Reynolds or Martin and one other representative from housekeeping. This compromise was unacceptable to Reynolds because the only other union representative who spoke Spanish, David Pedrosa, was not at work to replace Martin. Reynolds was unwilling to have another representative take his place as the representative of the Union's interests. When this compromise proved unacceptable, Plackenmeyer told Reynolds and Martin to go back to their posts. Reynolds asked to speak to Crespo first.

Reynolds testified that he told Crespo that he had to cooperate with the investigation, but that he also had a right to union representation and that he should request representation. Reynolds testified that Crespo could not understand what was going on so he had Martin explain it to him in Spanish. After this conversation, Crespo went back into the conference room alone and came back out a short time later. Crespo and Martin corroborated Reynolds regarding this conversation. Crespo testified further that, when he was alone with Plackenmeyer and the other management representatives in the conference room, Plackenmeyer started to ask him questions about the missing money. Crespo told Plackenmeyer that he wanted to cooperate and was willing to answer the questions if he had representation. According to Crespo, Plackenmeyer told him if he did not answer the questions, he would be suspended. When Crespo repeated his request for union representation, Plackenmeyer told him he was suspended. At that point, Crespo left the conference room.

At some point during the above exchanges, Calvo arrived for his interview and Martin and Reynolds explained to him what was going on. Calvo testified that he saw Crespo leaving the conference room when he arrived. Calvo spoke to Martin and Reynolds in the hallway before entering the conference room and they gave him a piece of paper to read to the Respondent's representatives. According to Calvo, he was alone in the conference room with Plackenmeyer, Gold, and Timmermann. When Plackenmeyer started asking him questions, Calvo read from the paper a statement in English indicating that he was willing to cooperate but wanted union representation. Calvo recalled that, after he read this statement, Plackenmeyer, Gold, and Timmermann had a conversation which he did not understand and then Plackenmeyer told him, "either answer my questions, or you're suspended." Calvo denied that Plackenmeyer offered him a choice of Martin or Reynolds or one other representative. According to Calvo, when he repeated his request for representation, Gold told him he was suspended.

The Respondent's witnesses did not testify in the same detail as Reynolds regarding the various conversations that occurred on August 24. Gold recalled that Reynolds came to the conference room and insisted on being present with Martin for the interviews. According to her recollection, Plackenmeyer told Reynolds that the employees could have a representative, not two and, in particular, not Reynolds and Martin because of their position as on-duty security officers. Gold also recalled the compromise that was offered by Plackenmeyer, to have either Martin or Reynolds and a second representative from housekeeping, but she could not recall at what point in the affair this came up. Gold admitted that Reynolds said a lot of things during these conversations and that she did not recall everything that he said. Gold also acknowledged that, at the conclusion of the discussions between Plackenmeyer and Reynolds, she and Plackenmeyer told Crespo that if he didn't cooperate in the investigation, that he would be suspended and that Crespo responded by asking for union representation. According to Gold, only when Crespo insisted on having both Martin and Reynolds as his representatives did she tell him he was suspended. Gold also recalled Calvo reading from a piece of paper and being unwilling to answer questions unless Reynolds and Martin were allowed to be present. Plackenmeyer's recollection of the events of August 24, did not differ significantly from that of Gold. Timmermann did not add anything of significance in his testimony.

By letters dated August 25, authored by Gold, Calvo, and Crespo were suspended for 5 days and 10 days, respectively. The first two paragraphs of the letters were identical, describing the August 20 incident and the student's complaint that led to the Respondent's investigation. The letters then described the investigatory meetings on August 24. The letter to Crespo provided the following description of the meeting:

> . . . .despite repeated requests by the College, neither you nor Mr. Martin would participate in the meeting. Mr. Martin then left the meeting and returned with Mr. Orton Reynolds, the Union president, and both Mr. Reynolds and Mr. Martin insisted on being present at the meeting. In response, the college said it would permit either Mr. Martin *or* Mr. Reynolds to attend the meeting as your representative. Mr. Plackenmeyer indicated that one security officer would have to return to his Security post (both were on duty at the time). When the Union again asked for an additional union representative, Mr. Plackenmeyer proposed, as a concession to the Union, that a second union representative be called from the facilities department. The Union did not accept Mr. Plackenmeyer's suggestion and you, Mr. Reynolds and Mr. Martin refused to participate in the meeting.
>
> Throughout this matter, you refused to answer any questions from the College. After Mr. Martin and Mr. Reynolds left the meeting, you continued to refuse to cooperate with the College's investigation. The College again offered you union representation (two additional union representatives were on duty) but you refused.

The letter to Calvo described his August 24 meeting as follows:

> At the scheduled meeting, in response to each of Mr. Plackenmeyer's questions you read a statement that said you would not participate in the College's investigation unless you were able to have two union representatives that you selected attend

> the meeting. Throughout this brief meeting, you refused to answer any questions from the College and chose to leave with Mr. Martin rather than cooperate with the College's investigation. The College again offered you union representation (two additional union representatives were on duty) but you refused.

The letters concluded by reciting the Respondent's reason for suspending Calvo and Crespo in nearly identical terms:[4]

> Based on your misconduct on August 20, 2000, which includes your unauthorized presence in a student's locked room, your mishandling of a student's personal property, your failure to provide a credible and consistent account of your activities during the theft of the student's property, and your failure to cooperate in the College's investigation of the theft you are suspended…

Calvo and Crespo served out their suspensions and returned to work. The Union pursued grievances on behalf of both employees.

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court held that Section 7 of the Act gives employees the right to union representation at an investigatory interview where an employee reasonably believes the investigation may result in discipline. The parties are in agreement that the *Weingarten* rule applied to the August 24 meetings at which Plackenmeyer attempted to question Calvo and Crespo regarding the alleged theft of a student's money. Where the parties disagree is whether the Respondent denied Calvo and Crespo their right to representation by limiting the role of their representative. The determination of this issue rests on resolution of the conflicting testimony regarding what Plackenmeyer said at the beginning of the meeting with Crespo, the first of the two to be interviewed.

I find, based on the testimony of Martin, which was corroborated by Timmermann, that Plackenmeyer told Martin that he was there only to observe the process and that he was not to say anything or otherwise interrupt Plackenmeyer's questioning of the employees. I did not find Gold's or Plackenmeyer's description of this portion of the meeting credible. Neither Gold nor Plackenmeyer testified with any degree of confidence regarding what was said, both claiming they could not recall in detail what occurred at the meeting. Although both denied that Plackenmeyer used the word "observer", they acknowledged that Plackenmeyer said he expected the employee, not Martin, to answer the questions and that he did not want to be interrupted. I also note that Martin had already served as the *Weingarten* representative for Calvo and Crespo during Gold's investigation of this incident and it is undisputed that he did not interrupt or otherwise interfere with the questioning then. With this history in mind, It is unlikely that Martin would have become so upset that he felt the need to call the Union's president if Plackenmeyer had not attempted to limit his role to that of a silent observer. Similarly, the lengthy discussion that occurred after Reynolds arrived on the scene, including the call to the Respondent's chief legal officer, would in all likelihood not have occurred if Plackenmeyer's instruction to Martin had been as innocent as the Respondent would have me believe.

It is clear from a reading of the Court's decision in *Weingarten*, and Board cases that have applied the rule, that a union representative has a right to actively participate in such an interview. Although the Court and the Board have said that an employer has no obligation to bargain with the *Weingarten* representative and has the right to conduct its investigation in any manner it sees fit, the employee is entitled to the "assistance" of his representative. Such assistance has been recognized as going beyond being a mere passive observer of the proceedings. *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), enf. denied 667 F.2d 470 (5th Cir. 1982); *Texaco, Inc.* 251 NLRB 633 (1980), enfd. 659 F.2d 124 (9th Cir. 1981). See also *Talsol Corp.*, 317 NLRB 290, 331–332 (1995) (employer violated Act by telling union steward that she was at meeting only as an observer); *United States Postal Service*, 288 NLRB 864, 868 (1988) (three "interruptions" by the *Weingarten* representative were permissible in the face of the employer's insistence on complete and exclusive control of the proceeding); *Greyhound Lines*, 273 NLRB 1443 (1985) (requirement that the *Weingarten* representative remain silent unlawful). Cf. *New Jersey Bell Telephone*, 308 NLRB 277, 279–280 (1992) (*Weingarten* representative has the right to object to questions reasonably perceived as harassing but cannot preclude the employer from using legitimate investigative techniques). So long as the union representative does not attempt to convert the investigation into an adversarial proceeding, he is within the bounds permitted by *Weingarten.*

Here, there is no evidence that Martin attempted to convert Plackenmeyer's investigation into an adversarial proceeding, or otherwise attempted to obstruct his questioning of Crespo and Calvo. In fact, Martin never got the chance to do anything because the investigation came to a halt when Plackenmeyer unlawfully sought to silence Martin at the beginning of the meeting. The Respondent attempts to shift the focus away from Plackenmeyer's conduct by painting a picture of Reynolds as obstructionist and by emphasizing the steps it took to accommodate the Union, such as offering to have another representative replace either Martin or Reynolds so that one of the guards could return to his post. The Respondent misses the point. Whether the Union had one representative or two, whether the representative was Reynolds or someone else, the fact remains that Plackenmeyer was not about to let whoever was there "assist" the employee during the interview. As long as the Respondent insisted that the *Weingarten* representative was there merely to observe the process, it was denying Crespo and Calvo their right to representation. Because there is no evidence that Plackenmeyer ever retreated from the position he took at the outset of the meeting, I must find that the Respondent violated the Act as alleged and denied Crespo and Calvo their right to a representative in violation of Section 8(a)(1) of the Act.[5]

[4] The only difference between the two is that the Respondent cited Crespo's March 24 suspension as a further basis for discipline. According to Gold, it was because of this prior discipline that Crespo received a longer suspension than Calvo.

[5] Although the Respondent raised deferral under *Collyer* as an affirmative defense in its answer to the complaint, it did not pursue this argument in its brief. Assuming that the Respondent still takes the

The complaint alleges that the Respondent also violated Section 8(a)(1) of the Act by conducting investigatory interviews of Calvo and Crespo after they had been denied the benefit of representation. I find that the facts do not support this allegation. It is clear from the testimony of all the witnesses that, after the lengthy and unsuccessful discussions over who could serve as the employees' representative, and after Crespo and Calvo insisted on having Martin and Reynolds represent them, Plackenmeyer suspended the investigation and did not question either employee regarding the alleged theft of money. Accordingly, I shall recommend that this allegation be dismissed.

Finally, the complaint alleges that the August 25 suspensions of Calvo and Crespo violated Section 8(a)(1) of the Act because based, at least in part, on their refusal to participate in the investigation without representation. The Board has held that, when an employee invokes his *Weingarten* rights, the employer must either afford the employee a representative or suspend the interview. If the employer suspends the interview, it is free to take action based upon information already obtained in the investigation. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. supra at 258–259. The Board will not order a make-whole remedy for a *Weingarten* violation unless the General Counsel can show that the discipline was the direct result of the employee's assertion of his *Weingarten* rights. *Postal Service*, 314 NLRB 227 (1994); *Massilon Hospital Assn.*, 282 NLRB 675 (1987); *Taracorp Industries*, 273 NLRB 221 (1984). Cf. *Southwestern Bell*, 251 NLRB supra at 615.

Gold's suspension letters to Crespo and Calvo did specifically cite each employee's refusal to cooperate in the investigation on August 24, and their insistence on union representation during that investigation. The evidence also establishes that Crespo and Calvo were told, on August 24, that if they did not cooperate by answering Plackenmeyer's questions, they would be suspended. The General Counsel relies on these facts to establish a violation. The General Counsel also argues that, had the Respondent had sufficient evidence to justify discipline before the August 24 incident, it would already have suspended Crespo and Calvo. The Respondent counters that it had just cause to suspend these employees based on the information it already obtained in its investigation. Although the issue is a close one, I agree with the Respondent that Crespo and Calvo were not suspended because of their insistence on union representation at the August 24 interview. Before the August 24 meeting, the Respondent had already conducted a substantial investigation into the alleged theft. The student had been questioned by the Respondent's security officers and by Gold. Even Crespo and Calvo had been interviewed by Gold on August 21, with the meaningful assistance of three union representatives. I note that it is undisputed that union representatives Adams and Kaiser were permitted to speak up in behalf of Crespo and Calvo to defend the procedures they followed to clean the dormitory rooms on August 19 and 20. Under these circumstances, the Respondent had enough information to make a decision whether discipline was warranted before August 24. It is unlikely that Plackenmeyer's investigation on August 24, had it gone forward, would have uncovered anything new. In fact, because of Plackenmeyer's experience as a police officer and his role as the head of the security department, it is most likely that what the Respondent hoped to obtain at these interviews was a confession to bolster any disciplinary action it decided to take. This may in fact explain why it was so important to Plackenmeyer that Martin not interrupt his questioning. Having considered the evidence, I find that the General Counsel has failed to prove that the Respondent's suspension of Calvo and Crespo was the direct result of their request for union representation. Accordingly, I shall recommend that this allegation be dismissed.

position that this allegation is deferrable, I shall reject this defense. Nothing in the collective-bargaining agreement covers employees' *Weingarten* rights. Because the contractual grievance procedure limits grievances to "disputes arising out of the interpretation or application of this Agreement," the dispute at issue here is not appropriate for deferral.

B. The Discharge of Crespo

The facts regarding Crespo's discharge are not in dispute. Timmermann testified that, on November 17, he returned to the campus toward the end of Crespo's shift and found him in the economics computer lab, on the telephone, sitting in front of the computer. According to Timmermann, he returned to the campus because he had found Crespo in the same room with the door locked earlier in the evening, as he was leaving work. Timmermann testified that the door was also locked when he returned around midnight and that he observed Crespo closing a window on the computer screen as he opened the door. By memo dated November 21, Timmermann suspended Crespo indefinitely "pending the outcome of a review of your employment record." Timmermann's memo described the incident of November 17, and referred to his prior disciplinary record, including the August 25 suspension which is alleged to be unlawful in the instant complaint.[6] By letter dated November 28, Gold advised Crespo that the Respondent had made a decision to terminate him based on the November 17 incident and his entire employment record, including the August 25 suspension.

Crespo admitted that he was in the computer room, using the phone and the internet, when Timmermann found him there on November 17. He also admitted that he did not have permission to use either the phone or the computer at the time. Crespo also acknowledged that the suspension he received in March occurred after his supervisor found him using a phone in the basement of Millbank Hall, again without permission. Finally, Crespo admitted that November 17, was not the first time he had used the phone or computer at work without permission.

The Respondent conducted a further investigation of Crespo's telephone usage after he was terminated. According to Susan Krause, the Respondent's director of human resources,

[6] Timmermann, in his memo, described the November 17 incident differently than he did at the hearing. In the memo, Timmermann did not say he found Crespo in the computer room with the door locked the first time. Instead, he stated that, after calling out Crespo's name during a routine inspection of the area, he heard a chair moving in the computer room and then saw Crespo come out of the room carrying a waste basket. I find this discrepancy immaterial because Crespo essentially admitted the alleged misconduct.

this was done in preparation for an expected arbitration of his discharge grievance. Krause testified that she obtained a report from Columbia University, which maintains the telephone system used by the Respondent, on or about December 29, showing that a call was made from the telephone in the economics computer lab on November 17, to a telephone number in Puerto Rico at 11:36 p.m. that lasted almost 27 minutes. About a month later, In January 2001, Krause requested and received a more detailed report showing all calls from the same telephone for the period from October 3 through November 30. By doing a reverse directory search, Krause was able to determine that more than 40 calls had been placed to Crespo's home phone number during this period.

The General Counsel does not argue that the Respondent did not have cause to discipline Crespo for his unauthorized use of the phone and the computer on November 17. Rather, the allegation that Crespo's discharge was unlawful is dependent upon a finding that the August 25 suspension was unlawful. The General Counsel contends that, because the Respondent relied upon an allegedly unlawful suspension as one step in its progressive discipline procedure, the discharge is tainted. Because I have found above that Crespo's August 25 suspension was not unlawful, it follows that the discharge did not violate the Act. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

C. Alleged Refusal to Meet with Union Representatives

Reynolds testified that a second-step grievance meeting for Calvo's suspension was scheduled for November 30, in the same conference room where the August meetings had been held. On the way to the meeting, Reynolds told his supervisor that he was going to a grievance meeting. According to Reynolds, the supervisor told him that "the boss said you can't go to the meeting." Reynolds replied that he was going to the meeting even if it meant he would be disciplined. When Reynolds got to the Facilities Services Department office, he met Martin and Calvo outside the conference room. Reynolds testified that he saw Plackenmeyer go into Gold's office and come out. After Plackenmeyer left her office, Gold came out and told Reynolds that the meeting was cancelled. According to Reynolds, Gold said that they could not have both Reynolds and Martin attend the meeting. Reynolds recalled that Gold made some reference to the fact they were both security officers. On cross-examination, Reynolds denied that he gave Gold only 10 minutes notice that both he and Martin would be attending the meeting. He conceded that he may have given his supervisor only 10 minutes notice that he was going to the meeting. Martin was not asked about this incident. Calvo testified that he met Martin outside Gold's office for a meeting on his grievance in November. According to Calvo, when Gold arrived, Martin told her that they were waiting for Reynolds. Calvo recalled that Gold then said, "the meeting is over, go back to work." Gold's description of this meeting was consistent with that of Calvo.

Martin and Reynolds testified that it was customary for both of them to attend grievance meetings together and that, prior to August 24, the Respondent had never objected to this. Reynolds testified further that, during his first year as union president, Gold had objected to the presence of two union representatives at a second-step grievance meeting. After some discussion between the parties, Gold dropped her objection. According to Reynolds, when the 1999 contract was negotiated after this incident, the Union successfully sought a change in the language of the grievance procedure to pluralize the word representative at the second step. Reynolds testified that no change was made with respect to the other steps of the grievance procedure because the dispute only occurred at the second step. The General Counsel also placed in evidence a number of grievance meeting confirmation forms, maintained by the Union, showing that more than one security officer had been scheduled to attend grievance meetings in the past. The most recent of these forms, however, is dated December 12, 1997. Reynolds claimed that he did not have any more recent forms because the scheduling and confirmation of grievance meetings is now done by e-mail. Reynolds' testimony in this regard was not entirely consistent with earlier testimony in which he said that the use of e-mail started about a year before the hearing. The confirmation forms also show that all of the meetings at which Reynolds and another security guard were scheduled to attend were scheduled to start before Reynolds shift began. Reynolds explained that, in many instances, these meetings last beyond the start of his shift.

Reynolds also testified that, on August 24 and November 30, he was not "off his post" when he attempted to attend meetings with the Respondent's representatives because he was assigned to the South Campus post. The Facilities Services Department office where the meetings were to be held is on South Campus. There is no dispute that this post is a roving, not a fixed, post. According to Reynolds, he carries a beeper that allows him to be contacted if any incidents occur on his post while he is in a meeting. Reynolds testified that this has in fact happened in the past. Reynolds testified further that, soon after Plackenmeyer became head of the Safety and Security department, he and Plackenmeyer agreed that Reynolds would be assigned to the South Campus post to facilitate his attendance at meetings involving union matters. There is no dispute that, after the August 24 incident, Plackenmeyer began rotating Reynolds' assignments. Plackenmeyer testified that he put Reynolds back in rotation because the reason for the earlier agreement, i.e. that Reynolds had regular meetings with Krause, no longer existed.

Gold testified that she could not recall any other grievance meetings attended by two security guards at the same time. Krause testified that, in response to a subpoena from the General Counsel and in preparation for the hearing, she reviewed all second step grievance responses that had been prepared by the Respondent since 1999. According to Krause, these responses show when second-step meetings were held and who was present. Krause testified, without dispute, that she found no second-step meetings at which both Martin and Reynolds were present, although she acknowledged that there may have been one meeting attended by two security guards. Plackenmeyer testified that the Respondent could not afford to have two security guards off post, attending a meeting, because there are usually only 7–8 guards on duty between 4 p.m. and Midnight. Plackenmeyer did recall attending an investigatory interview of another employee in early 2000 at which Reynolds and another security guard, Aaron Kinard, served as the employee's union

representatives. Plackenmeyer recalled that the meeting occurred at a time when one of the guards was finishing his shift and the other was just starting his shift.

The General Counsel contends that Gold's refusal to meet with both Reynolds and Martin regarding Calvo's grievance amounted to a unilateral change in the parties' grievance procedure. The evidence in the record clearly establishes that it was common practice for more than one union representative to attend grievance meetings. In fact, the parties negotiated a change in the language regarding the second-step of the grievance procedure specifically pluralizing the word "representative" in 1999 to address this issue. The parties dispute how common it was for more than one security guard to attend a grievance meeting at the same time with the testimony of Reynolds and Martin in direct conflict with that of Gold and Krause. I found neither the General Counsel's nor the Respondent's witnesses totally credible as to this aspect of the case. The testimony of both sides appeared to be exaggerated and the truth probably lies somewhere in between the two extremes. Thus, I find that there were occasions when two security guards attended a grievance meeting together and that, prior to August 24, such incidents were of no concern to the Respondent as long as it had advance notice that the guards would be attending such a meeting. The Respondent's "concern" about two guards attending a meeting clearly arose as a direct result of the dispute that erupted when Plackenmeyer's efforts to wrest confessions out of Crespo and Calvo were forestalled by Reynolds' and Martin's insistence on providing meaningful representation to the accused employees.

The Respondent also asserts a business justification for Gold's refusal to meet with Reynolds and Martin on November 30, claiming that it needed to maintain coverage of the security posts on campus. However, Plackenmeyer essentially conceded that this concern could be accommodated by the parties existing practice of scheduling grievance meetings in advance, including identifying who would be in attendance at the meetings. With such advance notice, the Respondent could arrange to cover the posts of a guard who was needed at a grievance meeting. None of the Respondent's witnesses testified to any particular problem that occurred on November 30, that made it necessary to deviate from the parties' practice. Based on this evidence, I find that Gold's refusal to meet with Reynolds and Martin regarding Calvo's grievance was a departure from the parties agreed-upon grievance procedures and a unilateral change in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. By refusing to permit the Union's representative to participate in the investigatory interviews of Fernando Calvo and John Crespo on August 24, 2000, the Respondent has interfered with its employees' right to representation at an investigatory interview that the employees had reasonable cause to believe might result in discipline, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to meet with the Union's two designated representatives for a second-step grievance meeting on November 30, 2000, the Respondent has unilaterally changed the terms and conditions of employment of its employees represented by Transport Workers Union of America, Local 264, AFL–CIO and has failed and refused to bargain collectively in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated any other provision of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. For the reasons discussed above, I find that a make-whole remedy is not warranted for the violations of employees' *Weingarten* rights found here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Barnard College, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to permit the Union's representative to participate in the investigatory interview of employees which the employees have reasonable cause to believe might result in discipline.

(b) Failing and refusing to bargain collectively with Transport Workers Union of America, Local 264, AFL–CIO (the Union) as the exclusive representative of the employees in the following unit concerning terms and conditions of employment by making unilateral changes in the grievance procedure:

> All full-time, regular pert-time and temporary buildings and grounds and residence halls employees employed by the Respondent at and out of its facility located at 3009 Broadway, New York, New York.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with notice and an opportunity to bargain before making any changes in the grievance procedure covering the employees in the unit described above.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 14, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny you your right to a union representative at an investigatory interview which you reasonably believe may result in discipline.

WE WILL NOT refuse to meet with your designated union representatives at grievance meetings

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BARNARD COLLEGE